

NOT FOR PUBLICATION

AUG 27 2004

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JUAN BENITO CASTRO, aka Tony R.
Lanier,

Defendant - Appellant.

No. 03-50444

D.C. No. CR-93-00093-GLT-01

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Submitted August 3, 2004**
Pasadena, California

Before: REINHARDT, KOZINSKI, and CLIFTON, Circuit Judges.

Castro argues that the district court erred in failing to vacate counts 1, 2, 5,
and 6 of the indictment on account of a fatal variance between the indictment and

* This disposition is not appropriate for publication and may not be cited to or
by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral
argument. See Fed. R. App. P. 34(a)(2).

the facts proved at trial. Because Castro could have raised this issue in his prior appeal but did not, we conclude that he has waived his right to do so now. *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998).

The district court's denial of Castro's fatal variance claim is **AFFIRMED**.¹

The mandate shall issue forthwith.

¹ In a separate opinion filed concurrently herewith, we remand Castro's sentence for further proceedings.